

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,) 8:06CR43

Plaintiff,)

vs.)

ANDREW E. JENNINGS,)

Defendant.)

MEMORANDUM AND ORDER

This matter is before the court for initial review of the defendant's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Filing No. 60). The defendant also included a brief and an article discussing the United States Supreme Court case of *Brendlin v. California*, 551 U.S. __, 127 S. Ct. 2400 (2007), in support of the motion.

Rule 4(b) of the *Rules Governing Section 2255 Proceedings for the United States District Courts* requires initial review of the defendant's § 2255 motion. Rule 4(b) provides:

Initial Consideration by the Judge. The judge who receives the motion must promptly examine it. If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party. If the motion is not dismissed, the judge must order the United States attorney to file an answer, motion, or other response within a fixed time, or to take other action the judge may order.

The record indicates that the defendant plead guilty to Count I of an Indictment charging the defendant with possession with the intent to distribute fifty (50) grams or more of a mixture or substance containing a detectable amount of cocaine base, its salts, isomers, and salts of its isomers, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841 (a)(1) and Title 21, United States Code, Section

841(b)(1). See Filing No. 44, Judgment In A Criminal Case. The court sentenced the defendant to the custody of the Bureau of Prisons for 149 months and five years of supervised release. See *Id.* The court additionally ordered the defendant to participate in the 500-Hour Comprehensive Drug Treatment Program or any similar drug treatment program available. *Id.* The defendant appealed this court's order on the motion to suppress and the Court of Appeals affirmed the denial of the defendant's motion to suppress in *United States v. Jennings*, No. 8:06CR43, 2006 WL 2142260 (D. Neb. Jul. 07, 2006), affirmed by *United States v. Jennings*, No. 06-4109, 2007 WL 2142260 (8th Cir.) July 27, 2007).

In his § 2255 motion, the defendant alleges: 1) his conviction was obtained by use of evidence pursuant to an unconstitutional search; 2) he was subject to an unconstitutional search and seizure; and 3) he was denied effective assistance of counsel. The defendant also states in his motion that "counsel fail[ed] to brief the grounds." See Filing No. 60.

The defendant argued the first two allegations on appeal. However, claims which were raised and decided on direct appeal cannot be relitigated on a motion to vacate. *Bear Stops v. United States*, 339 F. 3d 777, 780 (8th Cir. 2003); *United States v. Wiley*, 245 F.3d 750, 752 (8th Cir. 2001). Therefore, the claims are denied.

The defendant's third claim is that his attorney, Alan Stoler, was ineffective. However, the defendant did not specify the nature of the alleged ineffectiveness. Rather, the defendant stated "counsel fail[ed] to brief the grounds." The specific nature of the claim cannot be determined. Therefore, this claim is denied.

Accordingly, It appears plainly from the motion and the record of prior proceedings that the defendant is not entitled to relief.

THEREFORE, IT IS ORDERED:

1. The court has completed the initial review of the defendant's motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by Person in Federal Custody (Filing No. 60).
2. Upon initial review, the court summarily dismisses the defendant's claims raised in the § 2255 motion.
3. A separate Judgement will be issued denying the § 2255 motion.
4. The Clerk is directed to mail a copy of this Memorandum and Order to the defendant at his last known address.

DATED this 8th day of November, 2007.

BY THE COURT:

s/ Joseph F. Bataillon
United States District Judge